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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 99-41266 JG
Chapter 13
ROBERT D. HARTMANN,
Debtor./

MEMORANDUM

The court will dismiss this case, with prejudice, as a bad faith filing¹.

BACKGROUND

This is the second chapter 13 case that the above debtor filed over a five month period. In late 1997, the debtor, facing a "criminal investigation and . . . multiple lawsuits pending"²,

¹Under Bankruptcy Code § 349(a), the court may, for cause, dismiss a case with prejudice such that a future case will not discharge any debts that were dischargeable in the earlier case. Except as otherwise noted, all further section references herein are to the United States Bankruptcy Code, 11 USC § 101 et. seq.

²Unless otherwise noted, the facts presented here are based on the Reply to Objections to Confirmation of Debtor's (continued...)

1 borrowed some \$250,000 on the security of his home, followed by an
2 additional borrowing in the sum of \$120,000 in March, 1998.
3 Either the debtor, or his spouse, Mary Hartmann ("Mary"), then
4 transferred over \$208,000 in loan proceeds to the debtor's son,
5 Robert G. Hartmann ("Robert").

6 The debtor also repaid \$100,000 of the home loan, purchased a
7 car for \$25,800, and paid off approximately \$55,000 in legal fees
8 and credit card debts.

9 The debtor and Mary were co-trustees of 800 shares of Bank of
10 America stock, which they held in a revocable trust. The stock,
11 earned by Mary through her employment, was presumptively community
12 property, a fact that the debtor has not denied. See Cal. Fam.
13 Code § 760 (West 1994)³. Over a four month period starting in
14 April 1998, the debtor and Mary liquidated the stock, and placed
15 proceeds totaling some \$68,000 in an account held jointly in the
16 names of Mary and Robert.

17 After the foregoing asset dispositions, the debtor filed his
18 first chapter 13 petition on September 8, 1998. The debtor's
19 Statement of Affairs, signed under penalty of perjury, stated that
20 over the year prior to the filing, the debtor had made no gifts of
21 \$200 or more, made no transfers of property out of the ordinary
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23 ²(...continued)
24 Chapter 13 Plan, filed by the debtor June 8, 1999.

25 ³Community property belonging to a debtor and the debtor's
26 nonfiling spouse is included in the debtor's bankruptcy
estate. Bankruptcy Code § 541(a)(2).

1 course of business, and that no accounts had been closed in which
2 /////

3 funds were held for his benefit⁴. The debtor then filed a chapter
4 13 plan proposing to pay \$11,214 to his prepetition creditors.

5 The debtor contends that after the filing, he learned for the
6 first time about the foregoing transfers. (The debtor offers no
7 explanation as to how the house, to which he held title in joint
8 tenancy with Mary, was twice encumbered without his knowledge.)
9 After consulting with counsel⁵, the debtor then requested and
10 obtained an order dismissing the case⁶.

11 After the dismissal, California State court judgments for
12 conversion and fraud were entered against the debtor⁷, and the
13

14 ⁴The debtor now admits in both his Memorandum and an
15 accompanying amendment to his schedules that at various times,
16 the proceeds of the real estate loans and stock sales were
17 held in various accounts, subsequently closed, before being
18 transferred to Robert.

19 ⁵The court is not privy to the advice given by counsel,
20 but notes that any property of the debtor that had been
21 fraudulently conveyed to Robert, or that Robert was secretly
22 holding for the debtor's benefit, would have not been eligible
23 for exemption from the debtor's estate, even if the transfers
24 had been avoided as fraudulent conveyances. See Bankruptcy
25 Code § 522(g).

26 ⁶ The debtor gave no explanation, and none was required,
for the voluntary dismissal. See Bankruptcy Code § 1307(b).

⁷According to the objecting creditors, they obtained
default judgments against the debtor for conversion and fraud
(continued...)

1 debtor went to work to better protect his assets from creditor
2 claims. Robert returned over \$213,000 of the money that he was
3 holding. With these funds, the debtor bought a retirement annuity
4 for \$75,000. The debtor also bought approximately \$26,000 worth
5 of life insurance. The debtor also repaid \$104,000 in secured
6 home loans.

7 On September 16, 1999, the debtor filed the present case. To
8 justify his filing of a new bankruptcy case only 3-1/2 months
9 after the dismissal of the prior case, the debtor filed a
10 "Declaration of Debtor re Changed Circumstances" under penalty of
11 perjury stating, "I lost my job."⁸

12 In this new case, the debtor listed the value of his interest
13 in the recently-purchased \$75,000 annuity as "0". The debtor
14 claimed as exempt his \$89,000 interest in Mary's IRA, an asset
15 that the debtor did not list in his Statement of Affairs for the
16 first bankruptcy case. The debtor claimed as exempt insurance
17 policies valued at \$16,000. The debtor claimed as exempt \$125,000
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19 ⁷(...continued)
20 totaling approximately \$160,000. The debtor's papers do not
21 controvert the creditors' assertion.

22 ⁸No per se rule exists that prohibits successive
23 bankruptcy filings by the same debtor, as long as they are in
24 good faith. One factor that the Ninth Circuit has cited as
25 being an indicator of the debtor's good faith is the fact that
26 "changed circumstances" occurred between the two filings. In
re Chisum, 847 F.2d 597, 599 (9th Cir. 1988), cert. denied sub
nom. Mortgage Mart, Inc. v. Rechnitzer, Trustee in Bankruptcy,
488 U.S. 892 (1988).

1 of home equity. The debtor filed a plan proposing to pay \$22,000
2 to his prepetition creditors.

3 The debtor admits that his testimony at the meeting of
4 creditors herein was "vague and misinformed". In part, he blames
5 his misconduct on the "misguided, now corrected, decisions of Mrs.
6 Hartmann" who with Robert, the debtor claims, took "protective
7 action on behalf of frightened elderly people." The debtor also
8 contends that he should be credited for having undertaken an
9 "orderly retrieval" of his fraudulently-conveyed property, even
10 though he either placed all of the orderly-retrieved property
11 beyond the reach of his creditors, by various devices, or spent
12 it, in anticipation of the new filing⁹.

13 DISCUSSION

14 This court has the power under § 105(a) to dismiss any
15 bankruptcy case that was not filed in good faith. See In re
16 Rubenstein, 71 B.R. 777, 778-79 (9th Cir. BAP 1987)¹⁰. Good faith
17 depends on the totality of circumstances. See In re Warren, 89
18 B.R. 87 (9th Cir. BAP 1988) (discussing the confirmation
19 requirement of § 1325 that debtor's plan be proposed in good
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21 ⁹The court is not suggesting that the transfers between
22 the first and second filings are not subject to avoidance as a
23 matter of bankruptcy law, nonbankruptcy law, or both.

24 ¹⁰The 1986 Amendment to § 105(a), adding the second
25 sentence, is widely recognized as a response to cases such as
26 In re Gusam Restaurant Corp., 737 F.2d 274 (2nd Cir. 1984),
which held that a bankruptcy court lacked the power to dismiss
a case sua sponte.

1 faith). Under § 349(a), the court may, for cause, dismiss the
2 case with prejudice.

3 Here, the court holds that the totality of circumstances
4 present warrants a dismissal with prejudice.

5 The circumstances include:

6 1) The debtor's filing of the first case following a series
7 of fraudulent conveyances;

8 2) The debtor's filing of false and misleading schedules in
9 the first case;

10 3) The debtor's use of credit (here, proceeds of the home
11 loans) to buy exempt property; see In re Armstrong, 931 F.2d 1233,
12 1237 (8th Cir. 1991);

13 4) The debtor's conversion of a great amount of property,
14 id.;

15 5) The debtor's filing of misleading schedules in the second
16 case;

17 6) The debtor's seeking to mislead creditors and the court by
18 justifying the second filing on the ground that circumstances had
19 changed because he had lost his job;

20 7) The debtor's giving false and misleading testimony at the
21 meeting of creditors in the second case; and

22 8) The debtor's use of chapter 13 to discharge debt that
23 would colorably be nondischargeable in a chapter 7 case.

24 The court finds the debtor's rationalizations to be
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1 unconvincing and inadequate¹¹. Certainly, the debtor's age, fear,
2 or alleged confusion does not entitle him to hide assets (or
3 profit from the hiding of assets by others), to omit or
4 misrepresent facts repeatedly in his bankruptcy papers, or to give
5 misleading testimony at the meeting of creditors.

6 As to the conversion activity after the first case was
7 dismissed, it is well established that a debtor's ability to
8 engage in prebankruptcy conversion of non-exempt to exempt assets
9 is not without limitation. As early as 1911, the Ninth Circuit
10 recognized that the actions of a debtor who converted non-exempt
11 funds to exempt assets in between two separate bankruptcy filings
12 warranted denial of the claimed exemptions. In re Gerber, 186 F.
13 693 (9th Cir. 1911) (holding "no court acting upon equitable
14 principles should sustain such a transaction"). See also In re
15 Glass, 60 F.3d 565, 570 (9th Cir. 1995).

16 Moreover, as noted above, the debtor's use of borrowed funds
17 to obtain exempt property, and the magnitude of the conversion
18 transactions, are indicative of fraud. Armstrong, 931 F.2d at
19 1237. Finally, the court notes that the debtor engaged in the
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21 ¹¹Although the court makes no specific finding, it appears
22 that the debtor also may have transferred some community
23 property into Mary's name, e.g., the annuity, prior to the
24 second filing without disclosing the transfer in his current
25 statement of affairs, which he signed under penalty of
26 perjury, see p. 4, supra. Because the undisputed facts amply
justify dismissal, the court sees no need to hold an
evidentiary hearing as to the debtor's many false statements
and omissions.

1 conversion transactions in question after he had obtained a
2 dismissal of a first bankruptcy case, a case that was replete with
3 false representations, and that such false representations may
4 have deprived the creditors of any incentive or meaningful
5 opportunity they might have had to seek conversion of that chapter
6 13 case to chapter 7 pursuant to § 1307(c). Such a conversion
7 would have resulted in the appointment of an independent trustee,
8 who could have sought avoidance for the benefit of the estate of
9 any fraudulently transferred property, including the \$207,000 that
10 Robert was then holding.

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12 CONCLUSION

13 For the foregoing reasons, the court will issue its order
14 dismissing this case, with prejudice. In order to provide any
15 interested creditors with an opportunity to request conversion to
16 chapter 7 as an alternative, the court will reserve jurisdiction
17 to hear any motions to convert, rather than dismiss, filed within
18 10 days following service hereof.

19 Date: August 19, 1999
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Edward D. Jellen
United States Bankruptcy Judge
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